THE WRIT OF AMPARO: A REMEDY TO PROTECT CONSTITUTIONAL RIGHTS IN ARGENTINA

The Supreme Court of Argentina in recent years has been engaged in the development of a new procedural remedy to provide effective protection for constitutional rights. The writ of amparo (the Spanish word for protection) is a constitutional suit of a summary nature roughly comparable to the Anglo-American writs of injunction and mandamus. The development is noteworthy in two respects. First, it shows the Court attempting to protect civil liberties in a country suffering from chronic political instability and increasing military dominance. Secondly, it shows the judiciary, in a civil law country, making law and ignoring codification by the legislature.

In Latin America, constitutional limitations on governmental power have generally not been effectively utilized to provide adequate protection for the individual. Those constitutional provisions designed to protect the individual from arbitrary infringements of basic human rights depend upon the existence of an independent body which constitutes a check on governmental and economic powers. The growth of an independent judiciary has been adversely affected by the Latin American tradition of authoritarianism. Evidence of this is found in Argentina where the government is strongly centralized. This centralization is marked by a great concentration of power in the executive branch. The situation might be characterized by the common, and somewhat simplistic, North American concept of Latin America as being composed solely of dictatorial and militaristic regimes.

Protection of constitutional rights is not, of course, a problem exclusive to Argentina or other Latin American countries. In the United States, where the executive power is more limited and the Supreme Court is often viewed as the protector of civil liberties, the court has been an unreliable defender of the individual, deferring often to the other branches of the government or to public opinion in general.[1] Problems generally associated wih Latin America are becoming more relevant in the United States as concern spreads over the stability and independence of the courts, repressive governmental measures, the concentration of economic wealth abusively used against the masses by the few in control, and the increasing influence of the military. These factors and the desire for change have led to an increasingly polarized society marked by extremism and factionalism not unlike that which confronts the Argentine judiciary and the Argentine people.

The judicially created remedy of amparo marks an important step in what might be termed an emerging constitutionalism in Argentina. The

[1] L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT, SELECTED ESSAYS 19-20 (1967).

success of amparo, along with constitutional government, however is threatened by continued political instability. The study here shows the Supreme Court attempting to carve out a meaningful role for itself in Argentine society by providing effective protection for civil liberties.

I. Extraordinary Remedies to Protect Constitutional Rights

The protection of individual rights demands a judicial system which affords effective remedies. Damage to fundamental human rights often cannot be adequately restored by submission of a complaint to the ordinary legal processes, which are typically dilatory. Extraordinary remedies, providing rapid judicial relief, are needed.[2]

The method by which an individual could obtain protection for the exercise of constitutional rights in Argentina, prior to the creation of the writ of amparo in 1957, was generally limited to the ordinary judicial processes. The ordinary procedure in the Argentine court system allows a party to raise a constitional question at trial similar to United States practice. Appeal to the Supreme Court is provided by way of the *recurso extraordinario* which is comparable to the common law writ of error.[3] The *recurso extraordinario*, based on Section 25 of the Judiciary Act of 1789 of the United States Congress,[4] gives the Supreme Court appellate jurisdiction over the final decisions of provincial courts and lower federal courts involving federal and constitutional questions. The Supreme Court, and all other courts in the country, have the power of judicial review. While the power is not expressly granted in the Constitution, both court decisions and some statutes recognize it.[5] Yet, this power of review is ineffective at times. Often when an individual is seeking relief from an act that curbs the exercise of constitutional rights, the ordinary legal processes are so time-consuming that irreparable harm results.[6]

Some Latin American countries solved this problem by expanding habeas corpus to protect constitutional rights other than personal liberty.[7] A notable example is the Brazilian *mandado de seguranca* (writ of security). Early in its history, Brazil adopted the English common law

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[2] Samuel Kot, SRL, [1958-IV] Jurisprudencia Argentina [J.A.] 216, 229, 92 Revista Jurídica Argentina-La Ley [La Ley] 626, 636 (1958); Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965).

[3] R. Bielsa, La Proteccion Constitutcional y el Recurso Extraordinario 181 n.3 (2d ed. 1958).

[4] *Id.* at 57; S. Amadeo, Argentine Constitutional Law 70 (1943) [hereinafter cited as Amadeo].

[5] Amadeo 73-75.

[6] Cases cited note 2 *supra*; Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions In Civil Rights Cases—A New Trend In Federal-State Relations*, 34 Ford. L. Rev. 71, 103 (1965-66).

[7] Amadeo 169.

writ of habeas corpus.[8] The writ, at common law, granted summary relief against illegal restraint by superseding the ordinary legal procedure. However, it was an inappropriate remedy in cases involving rights other than those of personal liberty.[9] In Brazil, the writ was first expanded to include not only physical deprivations of liberty but also threatened deprivations. It was later interpreted as a constitutional guarantee for the protection of all rights guaranteed therein. In 1926 the Constitution was amended to restrict the use of habeas corpus to its original, limited scope. In 1934, however, a new constitution created the *mandado de seguranca.* The basic idea of the *mandado de seguranca* is to provide protection for rights granted by the Constitution or other laws which are abused by the public authority. The objective is to cover all rights left unprotected by the restrictive and narrow writ of habeas corpus.[10]

The Mexican *juicio de amparo* is also a constitutional remedy, summary in character, to protect individual rights. The historical root of the Mexican amparo is unclear, but it appears to have been based at least in part on the English habeas corpus proceeding.[11] Early in the nineteenth century, advocates of constitutional reform in Mexico were interested in developing a device to protect against unconstitutional action by the government. The amparo proceeding was established in the Mexican Constitution of 1857.[12] While it differs in some respects from the Argentine amparo, the fundamental idea of constitutional protection through summary relief is found in both.[13]

The Argentine courts were urged many times to adopt an expansive theory of habeas corpus such as Mexico and Brazil had done.[14] The Supreme Court continually refused to do so. An example is found in the

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[8] Eder, *Habeas Corpus Disembodied: The Latin American Experience* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 463, 465-69 (Nadelmann, Von Mehren, and Hazard ed. 1961).

[9] 2 T. SPELLING, A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW § 1152 (1893). The common law, however, provided other remedies of a summary nature. The principle that "no wrong shall exist without a remedy" led to the development of extraordinary remedies which were available when the common law writs were unable to prevent injustice. Examples are found in the writs of injunction and mandamus. Both were based on the principle that a party who could show the existence of a clear legal right which was being injured or threatened by another party's action or inaction could seek a judicial order against that party when no other adequate remedy was available. See 1 SPELLING §§ 1-35 and 2 SPELLING § 1368. While these are not constitutional remedies in origin, they can be used to protect against invasions of constitutional rights.

[10] Eder, *Judicial Review in Latin America,* 21 OHIO ST. L.J. 570, 580-584 (1960).

[11] *Id.* at 599.

[12] K. KARST, LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY 619-20 (Latin American Studies Vol. 5, 1966).

[13] *See* G. BIDART CAMPOS, REGIMEN LEGAL Y JURISPRUDENCIAL DEL AMPARO (1968) who, in his extensive study of the Argentine amparo, includes many references to the similarities and differences between Argentine and Mexican practice; *see* KARST, *supra* note 12, at 614-646, 651-675 for case studies of the Mexican and Argentine amparo.

[14] AMADEO 169; BIDART CAMPOS, *supra* note 13, at 43-56.

case of *Ex Parte Bertotto*.[15] The postal authorities refused to send a publisher's newspaper through the mail because it contained incendiary items calling for revolution. The publisher sought to compel the authorities to mail the newspaper through the use of habeas corpus on the ground that their action inhibited free speech. The Court, reasoning that habeas corpus did not extend beyond the protection of personal bodily freedom, refused the plaintiff's request.

II. The Development of Amparo by the Argentine Supreme Court, 1957-1966

The Supreme Court of Argentina has from its inception exercised a fairly high degree of independence. As early as 1887, the court established the power of judicial review by declaring an act of the national legislature unconstitutional. Through the years the court has become a prominent and important Argentine institution.[16] The Court, however, has at times been subject to the control of the executive. Shortly after Juan Perón came to power, he took action to relieve himself from any possible embarrassment a meddlesome Court might cause. He impeached all members of the Supreme Court with the exception of one judge—the one who would agree with him.[17] Unfortunately, this was not the only time such action was taken.

In such instances the executive has a passive judiciary for any action it might wish to take. The Court acts as a rubber stamp lending an appearance of legality to the government. Therefore, when the Court *does* move to protect an individual from illegal governmental action, it is noteworthy because the Court cannot get too far out of line and still maintain its existence. The development of the writ of amparo presents such a situation.

The Supreme Court departed from prior case law, such as that evidenced by *Ex Parte Bertotto*,[18] in 1957. In *Angel Siri*[19] the Court created the writ of amparo. It held that the Constitution prohibited the judiciary from relegating a petition for the protection of constitutional rights to the ordinary judicial processes when rights were being arbitrarily violated by the state. The police had closed down the operation of a newspaper giving no reason for the action taken. This restrictive measure caused the owner to suffer a violation of his right to work and infringed the freedom of the press. The Court granted amparo to the petitioner, ordering the police to lift the restriction on the newspaper. Recognizing the duty of

[15] [XLI] J.A. 554, 559 (1933).

[16] Amadeo, 49, 55, 61-62, 75. It should be noted that the Argentine judiciary derives its power from constitutional provisions quite similar to article III of the United States Constitution.

[17] A. Whitaker, Argentina 127 (1964).

[18] Case cited note 15 *supra*.

[19] [1958-II] J.A. 476, 89 La Ley 531 (1957).

the judiciary to uphold the Constitution, it was necessary, said the Court, to find some means within the legal processes capable of protecting individuals from arbitrary state action.

The departure from the traditional interpretation given by the Supreme Court may have been motivated by a reaction to the dictatorial regime of Juan Perón who was overthrown in 1955. The Supreme Court had again been purged, this time of Peronists, by provisional President Lonardi after Perón's downfall.[20] General Lonardi placed new members on the Court who, while not followers of Perón, were in favor of Lonardi's policy of national reconciliation to end the bitter strife between various political factions.[21] Many who supported Perón's overthrow advocated stern measures against the remaining members of the ousted dictator's party.

Prior to *Siri*, a person in the position of suffering a violation of a constitutional right yet not deprived of physical liberty, could not have succeeded in a habeas corpus proceeding since the courts did not recognize an expanded theory of habeas corpus. Siri's request for protection, which in fact urged adoption of a remedy like the Mexican and Brazilian remedies referred to above, had been dismissed by the court of the first instance. The lower court interpreted the petition (*recurso de amparo*) as one for habeas corpus (*recurso de amparo de la libertad*) and held that such a petition would only lie to protect against an illegal deprivation of physical liberty according to judicial precedent.[22]

The reasoning of the Supreme Court in *Siri* was that constitutional rights, simply by being in the Constitution, required a procedural device offering effective protection. Rights granted by the Constitution were of primary importance. Protection of those rights not included within the scope of habeas corpus was constitutionally required. Express legislative authorization was not necessary in such a case due to the constitutional basis of the action.

Over the next few years the Argentine judiciary labored to develop a coherent body of law to govern the action of amparo.[23] The basic elements for the issuance of the writ were set forth in *Samuel Kot, S.R.L.*[24]

> . . . [W]henever it is clear and obvious that any restriction of basic human rights is illegal and also that submitting the question to the ordinary administrative or judicial procedures would cause serious or irreparable harm, it is proper for the judge immediately to restore the restricted right through the swift method of the recourse of amparo. . . . [J]udges must take special pains . . . so that they do not decide, through the highly summary procedure of this constitutional guarantee, questions susceptible of

[20] A. WHITAKER, ARGENTINA 153 (1964).

[21] *Id.*

[22] [1958-II] J.A. at 481, 89 La Ley at 534.

[23] *See* KARST, *supra* note 12, at 651-673 for the major cases decided during this period which are presented in an English translation.

[24] [1958-IV] J.A. 216, 92 La Ley 626 (1958).

> greater debate and which should be resolved in accordance with the ordinary procedures. . . .[25]

The Court in *Samuel Kot* held that amparo would lie not only against the acts of the state but also against arbitrary and illegal acts of individuals. In this instance the Court ordered union members to evacuate a factory that they illegally occupied thereby injuring the owner's right to work and depriving him of his property. The threat of restricting constitutional rights was not only inherent in the power of the state but also in the power existent in many organizations of a private nature, such as large businesses and labor unions. The Court noted that accumulation and concentration of vast wealth and power in these organizations constituted a very real source of concern in the area of personal liberties.[26] Amparo finds its origin in the Constitution and focuses on the individual and his basic human rights. It, therefore, grants protection whenever those rights are being injured regardless of the legal identity of the actor, be it the government or a private body.[27]

Concern about possible misuse of the amparo proceeding is evidenced by the warning the Supreme Court issued in *Kot*.[28] Due to its summary nature amparo does not provide full debate over the issue in question. Amparo is properly granted only when the injurious act is manifestly illegal. This concept is a flexible one because the appraisal of an act as manifestly illegal is somewhat difficult.[29] *Kot* provides an example of an act that can be categorized as arbitrary without undue difficulty. The workers occupying the factory made no claim of a legal right over the property. There was no question which required extensive debate.[30] However, the act of one party occupying the property of another contending to hold title to the property might not be a blatantly illegal act. Such a dispute might properly be litigated in the normal procedural fashion. The protection of the defendant's right to be heard fully in cases where he acts under a non-frivolous claim of possessing the right to so act by law or where his action is not manifestly illegal should lead to denial of the petition for amparo.

When the *Siri* case was handed down recognizing the constitutional basis of amparo, there existed no procedural rules to govern such a pro-

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[25] KARST, *supra* note 12, at 657.

[26] [1958-IV] J.A. at 228, 92 La Ley at 635.

[27] A fundamental distinction should be noted here between the Argentine and United States Constitution. The former enumerates the rights of individuals without reference to the parties who are obligated to respect them. BIDART CAMPOS, *supra* note 13, at 21. The Constitution of the United States, however, frames the rights of individuals in a negative sense by prohibiting the public authority, state or federal, from placing restrictions on those rights. Private violations of constitutional rights are not contemplated by the Constitution.

[28] [1958-IV] J.A. at 229, 92 La Ley at 636.

[29] BIDART CAMPOS, *supra* note 13, at 249-51.

[30] *Id.* at 250; [1958-IV] J.A. at 229, 92 La Ley at 636.

ceeding. It was determined that due to the similarity between habeas corpus and amparo, the procedure for habeas corpus would be applicable to actions of amparo. The courts, acting on their own initiative, ruled that since habeas corpus had been codified in the federal law and amparo had not, the statute regulating habeas corpus would apply except in those aspects where incompatible with the nature of amparo.[31]

The constitutional remedy of amparo, which the Court deemed necessary in order to curtail the abuse of the power of the executive branch and certain private groups, was developed during a period of extreme political and economic chaos. At such a time the writ of amparo was extremely important, yet the Court could not advance too rapidly against the executive. The membership of the Supreme Court had changed with the military overthrow of Perón. Since that time the military has either been in power or maintained close supervision of governmental action under constitutionally elected leaders.[32]

The Supreme Court, appointed by Lonardi, was maintained by the military junta headed by General Aramburu which deposed Lonardi after the latter had been in power for only two months. The Court recognized the de facto government of Aramburu and generally presented no threat to the junta's total control of the government. Aramburu was personally committed to returning the country to constitutional government but took strong repressive measures against the Peronists attempting to destroy them before the civilians regained control.[33]

The government returned to a constitutionally elected president in 1958. President Frondizi lasted for four years of his six year term. In 1962 the military again took control, dissatisfied with what they considered a soft line approach with the Peronists.[34]

The story was repeated again. A nominal civilian government under the true control of the military was recognized as legitimate by the Supreme Court.[35] The more liberal faction of the armed forces prevailed over the more conservative faction and elections were again held in 1963.[36] The new President, Arturo Illia, was ousted in 1966 by a conservative military faction, which vowed its intent to rule the country for at least ten years.[37]

The position of the Supreme Court in these years was not sufficiently stable to enable it to exercise an effective check on the executive power. While the Court granted amparo in many cases, it often refrained from

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[31] BIDART CAMPOS, *supra* note 13, at 98-99.

[32] *See* WHITAKER, *supra* note 17 for a general history of these years.

[33] *Id.* at 153-57.

[34] *Id.* at 163-69.

[35] Luis Maria Pitto, 252 Fallos de la Corte Suprema de Justicia de la Nación [Fallos] 177, [1962-II] J.A. 514 (1962).

[36] WHITAKER, *supra* note 17, at 167.

[37] R. ALEXANDER, AN INTRODUCTION TO ARGENTINA 52-54 (1969). This objective

ruling in cases where judicial intervention would have been untimely.[38] The watchdog attitude of the military could hardly enhance an independent judicial role in the affairs of the government.

III. The Codification of Amparo

Students of Argentine law, trained in the civil law tradition, are not as accustomed to the concept of judge-made law as are the students of the common law. The Napoleonic Code, the source of much of the law of Argentina, emphasized the power of the legislature and displayed a distrust of the judiciary. Judges were to apply the law, set forth in detailed provisions, in an administrative manner with minimal interpretation. However, this general principle is unrealistic. Judges constantly interpret the law. A glance at the code of any civil law country convincingly demonstrates that application without interpretation is not possible.

However, overt judicial law making, with no pretense of legislative authorization, is relatively rare in civil law countries. But the action of amparo was created solely by the Argentine Supreme Court with only a single justice dissenting on the ground that the law came only from the legislature.[39]

Demands for codification of amparo were not long in coming.[40] One writer, Bidart Campos, observed that the people feel more secure with a principle of law embodied in a statute. Case law, he said, fails to provide the sense of stability and the guarantee of certainty afforded by a detailed statute.[41]

Nine years after the Supreme Court handed down its decision in *Siri* the action of amparo was codified by the military junta under the leadership of General Juan Carlos Onganía which took control of the government in June, 1966. As will be pointed out below, the statute regulating amparo seemed to have the purpose of decreasing judicial intervention regarding action taken by executive. The question raised is to what extent the legislature can change the judge-made law of amparo.

The security of constitutional government in Argentina remained unstable with the coming to power of the Revolutionary Junta in 1966. Headed by Onganía, the junta issued the Act of the Argentine Revolution[42] which, among other things, designated General Onganía as Presi-

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went unfulfilled as the summer of 1970 saw another change with a different military faction in power.

[38] *See* cases collected in KARST, *supra* note 12, at 672, 673, 679.

[39] [1958-II] J.A. at 484, 89 La Ley at 536.

[40] Romero, Necesidad Urgente De Una Ley De Amparo De Las Libertades Constitucionales, [1961-IV] J.A. 108.

[41] Bidart Campos, Le Nueva Ley De Amparo, [1966-VI] J.A. sec. doct. 45.

[42] Acta De La Revolución Argentina, [1966] Anuario de Legislación (Anuario) 234 (1966).

dent, suspended Congress, and removed the justices of the Supreme Court, authorizing their replacement by the President.[43] It also declared that

> . . . [t]he government shall conform its commission to the dispositions of this Statute, to those of the National Constitution and laws and decrees dictated pursuant thereto to the extent they are not opposed to the goals enunciated in the Act of the Argentine Revolution.[44]

The decree, in effect, made the Act of the Argentine Revolution supreme to the Constitution. The President and the new justices of the Supreme Court were required to take an oath of allegiance to the goals of the Revolution as well as to the Constitution.[45]

Law 16.986 regulating amparo was promulgated by the President on October 18, 1966. Although proposed statutes had circulated before this time in the Congress[46] and within the executive branch,[47] the actual promulgation of the law came without previous notice taking many by surprise.[48] Discussion of the law and the Court's interpretation of it follows. The major provisions of the regulating statute are set forth in an appendix to this article.

A. *Amparo Against the Acts of Individuals*

> Article 1—The writ of amparo will be admissible against every act and omission of public authority which, in its present or imminent form, injures, restricts, alters or threatens, with manifest arbitrariness or illegality the rights or guarantees explicitly or implicitly recognized by the National Constitution, with the exception of individual liberty protected by habeas corpus.[49]

Article 1 of Law 16.986 differs in one major respect from the case law in characterizing the nature of the act which gives rise to an action of amparo. The statute recognizes the admissibility of the writ against an act or omission by the public authority which injures or threatens constitutional rights and is of an arbitrary nature. However, no reference is made to acts of individuals or private entities.

The question of whether amparo would lie against the act of a private party after the enactment of Law 16.986 was immediately raised in the courts. In November, 1966, the National Chamber of Appeals of Peace of the Federal Capital (intermediate appellate court) faced this issue in

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[43] *Id.* at 234-35.

[44] Estatuto De La Revolución Argentina, art. 3, in K. Karst & K. Rosenn, Supplementary Materials on Law and Development in Latin America (1969).

[45] Acta De La Revolución Argentina, [1966] Anuario 235 (1966).

[46] KARST, *supra* note 12, at 673.

[47] Lazzarini, La Acción de Amparo y el Proyecto del Poder Ejecutivo Nacional, 116 La Ley 884 (1964).

[48] BIDART CAMPOS, *supra* note 41, at 45.

[49] Ley 16.986, [1967-A] Anuario 500 (1966).

Díaz Colodrero[50] when a union discharged a member for allegedly violating union rules. The complainant, considering the dismissal manifestly illegal since there had been no hearing, sought amparo.

The court held that amparo would lie against the act of a private organization.

> . . . [D]espite its apparently all inclusive denomination ('Action of Amparo-Regulating Law'), the legal text referred to proposes only to regiment, with regard to both substance and form, the right and the exercise of the action of amparo in certain types of proceedings: those in which the injury to a constitutionally declared liberty is attributable to the public authority, leaving the others (aggressions committed by individuals or private entities) submitted to the guiding principles laid down by the doctrine and case law starting with the leading case of Kot.[51]

No indication was found by the court which suggested an intent to lay aside the case law. The court was unable to accept the conclusion that the framers of the statute intended to reverse the opinions of many judges and eminent treatise writers "by way of a simple omission."[52] To the contrary, the court noted that the origin of amparo was in the Constitution which granted certain rights to all individuals. In addition to the case law, the statutes of various provinces and some proposed statutes considered the identity of the aggressor irrelevant. These were referred to in the submission of the project of the amparo statute to the President as worthy precedent. Thus, felt the court, without an express reservation to the contrary, the case law which granted the writ of amparo against private parties must be considered to be in full effect.[53]

The court also reconciled its interpretation of Law 16.986 with the objectives of the Act of the Argentine Revolution. The court did not directly enter into the problem posed by the Act to the supremacy clause of the Constitution. However, it noted that the principles of the Constitution granted respect to the fundamental rights of man, and the recognition of such rights demanded the use of the amparo action to insure their exercise. The objectives of the National Revolution, said the court, were not opposed to the principles of the Constitution, but to the contrary, were in total accord with the Constitution in respecting individual liberties.[54]

It is questionable whether Law 16.986 could constitutionally have

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[50] [1967-II] J.A. 356 (1966).

[51] *Id.* at 357. The quotation cited is taken from a translation in Karst and Rosenn, *supra* note 44.

[52] *Id.*

[53] *Id.* at 360. In *Manuel Fernández Goncálves*, [1967-I] J.A. 73, 125 La Ley 416 (1966), another division of the same court, facing an identical question, refused to follow the defendant's suggestion that the new law had abolished amparo against acts of private parties. The court said that to so hold would be to return to the state of the law before *Kot* and ignore the judicial creation of amparo.

[54] [1967-II] J.A. at 357.

been interpreted as excluding the writ of amparo against the acts of individuals or private entities without overruling the *Kot* case. It was suggested, prior to the holding in *Díaz Colodrero*, that Law 16.986, if interpreted as constituting the exclusive federal remedy for amparo, would be unconstitutional since a statute cannot prohibit a guarantee required by the Constitution.[55]

In September, 1967 an attempt was made to remedy the defect of Law 16.986 in the Civil and Commercial Procedural Code of the Nation.[56] Article 321 provides that the summary process as established in article 498[57] will be applicable

> [w]hen a complaint is made against the act or omission of an individual which, in its present or imminent form, injures, restricts, alters or threatens with manifest arbitrariness or illegality some right or guarantee explicitly or implicitly recognized by the National Constitution, whenever the urgent reparation of the injury or the immediate cessation of the effects of the act is necessary, and the question, by its nature, ought not to be tried by any of the established procedures of this Code or other laws.[58]

The Code, which became effective in February 1968, only partially fills the legislative gap left by Law 16.986. While governing the civil and commercial courts, it is not applied by the criminal, labor, and economic penal courts.[59] Therefore, these courts have no procedural statute to follow in a petition for amparo against the act of an individual.

Since these courts are required to hear a petition requesting the issuance of the writ of amparo in such cases by the doctrine in *Kot*, the remaining question is the procedure to be followed. The labor courts, by Law 17.639,[60] now apply the new civil code to their cases where it is compatible with their prior procedure. Bidart Campos suggests three possibilities for the criminal courts and the special criminal court for economic matters.[61] One is application of the summary procedure of the new civil code. Even though it does not specifically apply to all federal courts, application by analogy would give the courts a procedure established specifically to regulate amparo against private acts. Secondly, the courts could use the procedure of Law 16.986. Though it specifically regulates an action against the public authority, it applies to all federal judges. Basing jurisdiction on the constitutional nature of amparo, the judges could use the procedure directly granted to them by the statute. As a

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[55] BIDART CAMPOS, *supra* note 41, at 46-7.

[56] Ley 17.454—Codigo Procesal Civil y Commercial de la Nación, [1967-A] Anuario 533 (1967).

[57] *Id.* at 583.

[58] *Id.* at 570.

[59] The *Penal Economico* is a special criminal court established to deal with the increasing number of violations of the laws regulating the economy.

[60] [1968-A] Anuario 491 (1968).

[61] BIDART CAMPOS, *supra* note 13, at 115-117.

third possibility, the courts could use the standards as developed by the case law. Before the amparo statute was enacted, all courts followed the procedure designed for habeas corpus. Since no specific procedure has been established for these courts, they could continue this practice.

B. *Effective Protection by Existing Legal Remedies*

> Article 2—The writ of amparo will not be admissible when: (a) Judicial or administrative recourses or remedies exist which permit obtaining protection of the constitutional right or guarantee at issue;[62]

Article 2(a) has been interpreted as codifying the prior case law without change.[63] The statutory standard, though, has been criticized for its vagueness.[64] While not contrary to the law developed by the courts, it is incomplete inasmuch as it leaves undefined the test to be applied to determine when the available remedy provides protection and when it does not.

The objective of amparo is *effective* protection by the immedate reestablishment of one's constitutional rights. The statute requires the exhaustion of administrative remedies and the use of existing judicial remedies. The right to bring an action in amparo arises when such remedies do not permit a party to obtain effective protection. The question is when are the available remedies unable to provide this protection. The Supreme Court in *Kot* seemed to answer this in the best fashion when it focused on the ability of the existing remedies to avoid grave and irreparable harm to the injured party.[65]

Special administrative remedies, established to resolve disputes by the agency which has allegedly violated the constitutional rights of an individual, must be exhausted before an amparo proceeding will lie. If such a remedy is not used, the injury complained of is considered uncertain and indefinite.[66] However, as the Supreme Court has recently held, where the actor (executive power) has made clear its intention to continue the action complained of by a party, it is not necessary to use an administrative remedy which in such a case is purely illusory.[67]

The existence of an *apt* legal means, administrative or judicial, whether an ordinary or extraordinary remedy, forbids the use of amparo.[68] The proceeding of amparo is not to be used as a substitute for established pro-

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[62] Ley 16.986, [1967-A] Anuario 500 (1966).

[63] Confederación Gral. de Empleados de Commercio de la Republica Argentina, [1967-VI], J.A. 95, 97 (C. Trab. Cap. 1967).

[64] BIDART CAMPOS, *supra* note 41, at 47.

[65] BIDART CAMPOS, *supra* note 13, at 191-92.

[66] G. BIDART CAMPOS, DERECHO DE AMPARO 147-48 (1961).

[67] Marcelo Sánchez Sorondo, [1968-IV] J.A. 56 (Corte Sup. de Justicia 1968).

[68] Antonio Gallardo, [1959-I] J.A. 635, 94 La Ley 749 (Corte Sup. de Justicia 1958); Confederación Gral. de Empleados de Comercio de la Republica Argentina, [1967-VI] J.A. 95 (C. Trab. Cap. 1967).

cedural remedies even when the issue concerns a violation of a constitutional right. However, the existing means are considered inapt when submission of the claim would cause grave and irreparable harm to the plaintiff.[69]

C. *Acts of the Judiciary and Exercise of the National Defense Law*

> Article 2—The writ of amparo will not be admissible when: . . . (b) The challenged act emanates from an organ of the judicial power or has been adopted by the express application of Law 16.970 (National Defense Law);[70]

The declaration in article 2(b), that amparo is inadmissible if the act complained of emanates from the judicial branch, is completely in accord with the case law.[71] A complainant may not institute a separate proceeding seeking amparo from the decision of a judge which he considers arbitrary.[72] The reasoning behind this prohibition is that to permit a judge foreign to a cause to overturn the decision of the judge of another competent court would bring about insecurity and instability in the judicial system.[73] Amparo is not to be invoked as a substitute for appellate review.

An act exercised under the provisions of the National Defense Law[74] may not be attacked by way of amparo according to the second clause of article 2(b). The defense statute was promulgated October 10, 1966 just prior to the enactment of the amparo statute. No cases arising under this provision of the amparo statute have been found.[75] The basic principles of the statute provide for an organization capable of protecting national security, establishing long range goals for development, and strengthening the national conscience over the problems inherent with security. These various goals are to be accomplished through a national security council with both military and intelligence committees. The implementation of the broad grants of authority given to these committees could have a very restrictive effect on the exercise of various constitutional rights. The effective protection of these rights requires the writ of amparo. The article 2(b) exemption is, therefore, somewhat disturbing.

In part, the prohibition of the use of amparo against the express application of the defense law is not new. During a declared state of siege,

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[69] Generally such harm results from ordinary procedures due to their characteristically dilatory nature, *Samuel Kot, S.R.L.*, [1958-IV] J.A. 216, 228, 92 La Ley 627, 635 (1958), or in administrative remedies from appreciable delay, *Confederación Gral. de Empleados de Comercio de la Republica Argentina*, [1967-VI] J.A. 95, 98 (C. Trab. Cap. 1967) and *Eduardo L. Vila*, [1968-II] J.A. 284, 285 (Corte Sup. de Justicia 1967) or when the procedural route is illusory, *Marcelo Sánchez Sorondo*, [1968-IV] J.A. 56, 57 (Corte Sup. de Justicia 1968).

[70] Ley 16.986, [1967-A] Anuario 500 (1966).

[71] BIDART CAMPOS, *supra* note 13, at 184-86.

[72] BIDART CAMPOS, *supra* note 66, at 221.

[73] *Id.* at 226.

[74] Ley 16.970, [1967-A] Anuario 659 (1966).

[75] This is based on research in *Jurisprudencia Argentina* up through the 1968 volumes.

due to internal disorder or foreign attack, constitutional rights are suspended by the express terms of the Constitution.[76] The courts of Argentina have held that acts of the state under such conditions may not be attacked by an amparo proceeding since the declaration is political and, therefore, not susceptible to judicial review.[77] The non-allowability of amparo regarding the application of the National Defense Law under a declared state of siege would have, therefore, judicial support.

A more difficult issue would be raised if action taken under the National Defense Law were alleged to have violated constitutional rights during a period when there had been no formal declaration of a state of siege. Such a situation would raise the question of whether article 2(b) of the law regulating amparo could constitutionally prohibit the issuance of a writ of amparo. It has been suggested in this connection that the courts should follow the statutory standards established to guarantee the exercise of constiutional rights, but only to the extent that such standards do not denaturalize the constitutional basis of the guarantees.[78] Prohibiting judicial protection of constitutional rights in every phase of governmental action which is labelled as a "national security" measure clearly undermines the Constitution and the case law.

D. *Judicial Intervention Compromising Activities Essential to the State*

> Article 2—The writ of amparo will not be admissible when: . . . (c) Judicial intervention would directly or indirectly compromise the regularity, continuity and efficacy of performance of a public service, or the development of activities essential to the state;[79]

The potential diminution of the action of amparo exists in section (c) of article 2 as well as in section (b) referred to above. This provision is clearly inconsistent with the constitutional theory of amparo. On its face, the section is so extensive and vague that it could destroy judicial protection afforded by amparo. It would seem difficult in many cases to hold that a judicial order of protection would not, at least indirectly, compromise the regularity, continuity, and efficacy of an activity essential to the state whatever such activity might be. First, Decree-Law 16.986 creates the writ of amparo against manifestly illegal governmental acts. Then, the law proceeds to take away the writ of amparo when granting protection would adversely affect state activities. Suppose, for example, that the police, during a period of social unrest, silence all criticism and dissent of governmental policies. Those silenced, as plaintiffs, might properly request judicial intervention on their behalf. It would seem absurd to per-

[76] Argentine Const. art. 23 (1853) (Pan American Union Translation).

[77] KARST, *supra* note 12, at 694-95.

[78] A. Robredo, La Acción de Amparo y la Reciente Ley 16.986, 124 La Ley 1292, 1296 (1966).

[79] Ley 16.986, [1967-A] Anuario 500 (1966).

mit the government, as defendant, to succeessfully defend on the ground that intervention by the court might compromise the effectiveness of governmental programs by increasing or permitting criticism.

Section (c) of article 2 has apparently never been subject to judicial interpretation. There is no support for the provision in the case law prior to 1966. It would seem that a court, confronted with a defense under section (c), would have to interpret it with the view that the primary concern is constitutionality as opposed to efficiency. Refusal by a court to grant amparo against an unconstitutional act because such action might impair the state's activities would be tantamount to saying that the judiciary has no role to play in the area of civil liberties.[80]

E. *Need for Greater Debate and Declaration of Unconstitutionality*

> Article 2—The writ of amparo will not be admissible when: . . . (d) The determination of the eventual invalidity of the act requires greater amplitude of debate or proof, or declaring laws, decrees, or ordinances unconstitutional;[81]

The principle of article 2(d), that amparo should not be granted when the issues presented require greater amplitude of debate, is consonant with prior judicial doctrine. The idea goes to the character of the summary procedure of amparo which emphasizes promptness and simplicity. This is considered as not only necessary for the protection of constitutional rights, but also as sufficient for the protection of the defendant because the writ can only be issued upon a finding of a manifestly illegal or arbitrary act. The very nature of the injurious act requires no extended debate. On the other hand, regular judicial proceedings should be used when the act complained of is not clearly illegal. This principle was recognized by the Supreme Court in the *Kot* case.[82]

The Supreme Court in 1967[83] rejected a complaint of amparo on the grounds of article 2(d) of the new law. The executive had intervened in the activities of a union allegedly acting in areas outside its legally designated economic function. The intervention by the government was based on the objectives declared in the Act of the Argentine Revolution of 1966.[84] The determination of whether the alleged political activities of some union members had taken place and the corresponding validity of the government's entrance into the affairs of the union could not be made, judged the Court, within a proceeding of amparo. The dispute required

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[80] For criticism on article 2(c) *see* BIDART CAMPOS, *supra* note 41, at 47 and Robredo, *supra* note 78, at 1296. The provision of article 2(c) is almost identical to a provision in the proposed statute of the executive branch in 1964, *see* Lazzarini, *supra* note 47, at 889-90.

[81] Ley 16.986, [1967-A] Anuario 500 (1966).

[82] [1958-IV] J.A. at 229, 92 La Ley at 636.

[83] Sindicato de Prensa, 268 Fallos 16, [1967-V] J.A. 36 (1967).

[84] *Id.*

> . . . an adequate debate and the production of corresponding proof, all of which exceed the stringent limits of a proceeding of the character [of amparo] attempted here and are appropriate to an ordinary proceeding.[85]

The second part of article 2(d) reaffirms the principle established previously by the courts that the action of amparo was not the proper procedural route for the declaration of the unconstitutionality of a law or decree. Many cases held generally that while amparo existed in order to restore constitutional rights affected by illegitimate acts, it was not the proper proceeding if the granting of amparo expressly declared or necessarily implied the unconstitutionality of a law.[86]

The opinions of the courts have been described as establishing a "vague criterion."[87] Essentially, the reasoning of the courts was as follows. There existed no declaratory action of unconstitutionality to attack a law or decree. This idea, that the judgment of the legislature or of the executive should not be contested by such an action, demonstrated that the laws of Congress and executive decrees carried a presumption of validity. In order to rebut this presumption, the courts required a concrete case or actual dispute tested by way of a hearing with full debate from the litigating parties. The proceeding of amparo, being highly summary in character, did not provide sufficient debate of the issues necessarily involved in the consideration of the validity of the law in issue.[88]

The judicial branch, early in its history, declared the power of judicial review to be implicit in the Constitution.[89] However, their concern over the delicate balance between the three branches of the government seemed to lead to the conclusion that for a judge to overrule the act of another branch, through the summary process of amparo, would be improper. The exercise of the power to declare a law unconstitutional called for a greater confrontation of the issues provided only by the normal judicial procedures.

In *J. Carlos Outon y otros*,[90] already labelled a leading case, the Supreme Court, in 1967, held that while in principle an action of amparo was improper to declare a law or decree unconstitutional, an exception arises when the law or decree is manifestly illegal. Here, by an executive decree, all maritime workers were required to present identification of union membership in order to be permitted to work. Some workers brought an

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[85] 268 Fallos at 20, [1967-V] J.A. at 38.

[86] BIDART CAMPOS, *supra* note 13, at 136; J. Carlos Outon y Otros, [1967-II] J.A. 369, 370 (2a Instancia 1965).

[87] BIDART CAMPOS, *supra* note 13, at 136.

[88] Asseradero Clipper, S.R.L., 249 Fallos 221, 226-7, [1961-IV] J.A. 108, 109, 109-11 (Corte Sup. de Justicia 1961); *see* BIDART CAMPOS, *supra* note 13, at 144 and Noailles, Posibilidad De Declarar La Inconstitucionalidad De Leyes, Decretos U Ordenanzas En Procedimientos De Amparo—Interpretación De Una Ley De Amparo—Los Derechos De Trabajar, De Asociación y De Sindicación Libre y Democratica, 126 La Ley 292, 294 (1967).

[89] AMADEO 73.

[90] 267 Fallos 215, [1967-II] J.A. 369 (1967).

action in amparo to have the decree declared unconstitutional since it violated the right to work and the right of free association by essentially requiring them to join the union.

The concern of the courts had been to avoid precipitous declarations of unconstitutionality by way of amparo proceedings. Yet, even though this rule would govern the majority of cases, it was necessary to create an exception in certain cases.

> [W]hen the dispositions of a law, decree, or ordinance clearly result in violations of any human rights the existence of the regulation cannot constitute an obstacle to the immediate reestablishment . . . of the violated fundamental rights.[91]

Article 2(d) could not be interpreted as establishing an absolute rule. It must be read as

> . . . a reasonable measure designed to prevent the amparo action from being utilized capriciously to impede effective enforcement of laws and regulations dictated in accordance with . . . the Constitution.[92]

The Court found this interpretation as necessary in order to conform article 2(d) with the purpose of the statute which was to assure the protection of individual guarantees against arbitrary acts. The institution of amparo would be destroyed, if a decree were found manifestly illegal as violative of a constitutional right and the courts were prohibited from granting relief due to an absolute interpretation of the rule.[93]

Concerning the propriety of judicial review in such cases, the Supreme Court pointed out that the Constitution obligated the judiciary to uphold the rights contained therein. The supremacy clause demanded respect for the Constitution, especially regarding the protection of individual rights. The Supreme Court had the power to decide all cases arising under the Constitution. As long as the cause was justiciable, regardless of the procedural device employed, no one could interfere with this obligation.[94] Significantly, there was no mention in the Court's opinion of the Act of the Argentine Revolution which had been decreed as being supreme to the Constitution.[95] As to the impropriety of declaring a law unconstitutional in an amparo proceeding, the Court pointed out that deference to ordinary judicial procedures is not necessary where a law or decree is clearly or manifestly illegal.

The decision of the Court in *Outon* is an interesting and important one in two respects. First, the greater legal protection afforded by the Court

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[91] Karst and Rosenn, *supra* note 44. The quotation appears in the case reports 267 Fallos at 218, [1967-II] J.A. at 371.

[92] *Id.*

[93] 267 Fallos at 219-220, [1967-II] J.A. at 371-72.

[94] *Id.* at 220, [1967-II] J.A. at 372.

[95] Estatuto De La Revolución Argentina art. 3, [1966] Anuario 233 (1966).

to individuals through the holding expanded judicial review in actions of amparo and subverted the intent of the decree-law. Secondly, it is significant for the time chosen by the Court to extend their review of the acts of the public authority. The Court itself was composed of new members appointed by President Onganía after the removal of the justices on the bench in 1966. The position of Supreme Court justices had not been stable during periods of political crises. Too independent a role by the Court could hardly have been expected. Yet the decision, at least in theory, reflects a fairly large step toward greater judicial review.

The Supreme Court took advantage of the political situation in a fashion similar to the United States Supreme Court in *Marbury v. Madison*.[96] The closed shop decree, which was declared unconstitutional in *Outon*, had been issued by President Illia in 1964.[97] The junta ruling in 1967, which had overthrown Illia in 1966, favored the effect of the decision which recognized the right to work to both union and non-union members. The junta itself was intent on purging the country of Peronism of which the unions were the main source. The decision of the Court was a hard blow to unionism. The Attorney General expressly argued before the Court in *Outon* that amparo be granted to the non-union workers.[98] The Court then was able to grant amparo in the case, complying with the desire of the administration and, at the same time, recognizing an exception to article 2(d) of the administration's law.

IV. CONCLUSION

The development of amparo by the Argentine Supreme Court and the subsequent judicial interpretation of the statute codifying the writ demonstrate important inroads on the problem of protecting individual rights. While the writ was instituted in part as a reaction to years of dictatorial government, its continuing development and efficacy have been tempered by constant political instability and extremism. The Supreme Court has been able, however, to create and, to a degree, expand the writ of amparo during this period when its need is vital. The Court has done so with its own existence almost continually threatened by numerous changes in executive branch.

The effect of Law 16.986 regulating amparo is uncertain. It should lead to more uniform and effective application of the writ by judges trained in the civil law tradition. However, the Court has made it clear through the *Outon* case that the action of amparo is a constitutional remedy not subject to curtailment by the other branches of government. The judges

[96] 5 U.S. (1 Cranch) 137 (1803). Here Chief Justice Marshall's holding favored the administration of the new President, Thomas Jefferson, who was a political foe of Marshall's.

[97] Decreto No. 280, [1964] Anuario 102 (1964).

[98] 267 Fallos at 216-17, [1967-II] J.A. at 370.

could have merely applied the new statute and ignored the prior case law development. That this did not happen illustrates the unwillingness of the courts to relinquish both their practice of interpretation of the Constitution and their ability to create what they deem to be necessary remedies.

It is apparent that one aim of the executive in issuing the statute was to limit the use of amparo in suits against the acts of the federal government. The potential effect of the law through the prohibitions of the issuance of the writ contained in article 2(b) and (c) could be destruction of the fundamental objective of amparo. The restriction of amparo in cases involving the National Defense Law, or in instances where its use would directly or indirectly affect the efficiency of the state, clearly favors the state over the individual. The extent to which the Court can go in declaring these prohibitions unconstitutional, or in creating exceptions to them, remains to be seen. Much depends on the direction taken by the executive. Return to a constitutionally elected government and a lessening of social and political unrest are essential requirements to a greater role by the Court.

The decision of the Supreme Court in *Outon* and holdings in other cases where the Court has granted amparo against executive acts[99] picture the Court asserting a degree of independence. Yet how effective can the Supreme Court be in protecting individual rights? *Effective* judicial review is not realistically possible in a society split by extreme political factions of the right and left. Such is the situation in Argentina at present. The judiciary must attempt to carve out a role for itself where some degree of limited review can be exercised over the executive. Deference to the executive is undoubtedly required often. Hopefully, though, the maintenance of a degree of independence will provide *some* protection to constitutional rights realizing that truly effective protection is not possible.

Thomas E. Roberts

APPENDIX—LAW 16.986: RECURSO DE AMPARO[100]

Article 1—The writ of amparo will be admissible against every act and omission of public authority which, in its present or imminent form, injures, restricts, alters or threatens, with manifest arbitrariness or illegality, the rights or guarantees explicitly or implicitly recognized by the National Constitution, with the exception of individual liberty protected by habeas corpus.

Article 2—The writ of amparo will not be admissible when:

[99] Hernán Argüello Argüello v. Dir. Nac. de Migraciones, 268 Fallos 393, [1968-I] J.A. 286 (1967). Here the Supreme Court granted amparo to an alien after the federal authorities had ordered him to leave the country on the grounds that he was a political activist with leftist views. The Court found no evidence supporting such a contention.

[100] This translation of the statute can be found in Karst and Rosenn, *supra* note 44.

(a) Judicial or administrative recourses or remedies exist which permit obtaining protection of the constitutional right or guarantee at issue;
(b) The challenged act emanates from an organ of the judicial power or has been adopted by the express application of Law 16.970 [The National Defense Law];
(c) Judicial intervention would directly or indirectly compromise the regularity, continuity and efficacy of performance of a public service, or the development of activities essential to the state;
(d) The determination of the eventual invalidity of the act requires greater amplitude of debate or proof, or declaring laws, decrees, or ordinances unconstitutional;
(e) The complaint has not been presented within 15 workdays, starting from the date on which the act was executed or ought to have taken effect.

Article 3—If the writ is clearly inadmissible, the judge shall reject it summarily, ordering the archiving of the proceedings.

Article 4—The Judge of the First Instance with jurisdiction in the place where the act is manifested or has or could have effect, shall be competent to grant the writ of amparo.

. . . .

Article 5—The writ of amparo may be brought by any individual or juridical entity, either personally or by attorney, who considers himself affected in conformance with provisions set out in article 1.

. . . .

Article 6—The complaint shall be in writing and shall set out:
(a) The name, surname, and real (and designated) domicile of the complainant;
(b) The identification, insofar as is possible, of the author of the impugned act or omission;
(c) Relation of the extreme circumstances which have produced or are about to produce injury to a constitutional right or guarantee;
(d) The relief requested, in clear and precise terms.

Article 7—The complainant shall accompany the written complaint with the documentary proof at his disposal; if not within his control, he shall identify it and indicate the place where it may be found.

He shall also indicate other measures of proof upon which he intends to rely.

The number of witnesses may not exceed five for each party.

. . . .

Article 8—When the suit is admissible, the judge shall require the corresponding authority to submit, within a prudently fixed period, a report

setting forth the background and bases of the impugned measure. Failure to request such a report is cause for nullity of the process.

. . . .

When the report has been produced, or the period fixed for its submittal has elapsed, and the complainant has no proof to transmit, judgment conceding or denying amparo shall be entered within 48 hours.

Article 9—If any of the parties have offered proof, its immediate production shall be ordered, with a date for the hearing to be fixed within three days.

. . . .

Article 11—When the report referred to in Article 8 has been submitted, or, where called for, an evidentiary hearing has taken place, the judge shall render his decision within three days. . . .

Article 12—A judgment which grants the writ shall contain:
(a) Concrete mention of the authority against whose resolution, act, or omission amparo has been conceded;
(b) Precise determination of the conduct to be observed. . . . ;
(c) The time by which the result must be carried out.

Article 13—The final decision, which declares the existence or nonexistence of the injury, restriction, alteration or arbitrary or manifestly illegal threat to a constitutional right or guarantee, is *res judicata* with respect to the amparo, leaving unaffected the exercise of actions or recourses which the parties may have independent of amparo.

. . . .

Article 15—Only final judgments, the resolutions provided for in Article 3, and . . . [decisions with a suspensive effect] shall be appealable. The appeal shall be taken within 48 hours of notification of the result challenged and shall set forth reasons for the challenge. [The appeal shall be either denied or granted within 48 hours.] In the latter case, the matter shall be sent up to the respective appellate court within 24 hours of being granted.

. . . .

Article 17—The procedural rules in effect are supplemental of the preceding norms.

Article 18—This law shall apply in the Federal Capital and in the territory of Tierra del Fuego, Antarctica, and the Isles of the South Atlantic.

It shall also be applied by federal judges in the provinces in cases in which the act impugned by writ of amparo stems from a national authority.

. . . .